

IN THE  
SUPREME COURT OF THE UNITED STATES  
OCTOBER TERM 1977  
NO. 77-142

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\_\_\_\_\_  
UNITED STATES OF AMERICA,  
PETITIONER,  
v.  
DONALD L. CULBERT,  
RESPONDENT.

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\_\_\_\_\_  
MEMORANDUM IN OPPOSITION  
TO PETITION FOR WRIT OF CERTIORARI

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Attorney for Respondent

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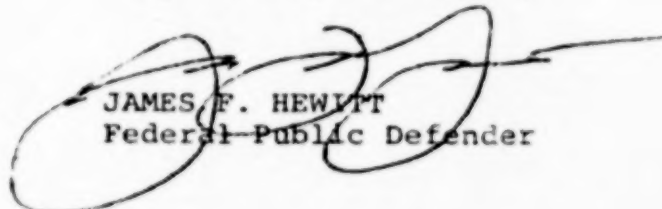
9 UNITED STATES OF AMERICA,  
10 PETITIONER,  
11 v.  
12 DONALD L. CULBERT,  
13 RESPONDENT.  
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15 MOTION FOR LEAVE TO  
16 PROCEED  
17 IN FORMA PAUPERIS  
18

19 Respondent, DONALD L. CULBERT, pursuant to Rule 53 and  
20 18 U.S.C. §3006A(d)(6), asks leave to file the attached  
21 Memorandum in Opposition to Petition for Writ of Certiorari  
22 without prepayments of costs and to proceed in forma pauperis.  
23 Respondent was represented by appointed counsel in the District  
24 Court and on the appeal to the United States Court of Appeals  
25 for the Ninth Circuit.

26 DATED: August 24, 1977

27 Respectfully submitted,

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29 JAMES F. HEWITT  
30 Federal Public Defender  
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21 Put simply, the issue is whether the Hobbs Act, 18  
22 U.S.C. §1951, may be interpreted so broadly that a neighborhood  
23 liquor store holdup becomes a federal offense. If the  
24 interpretation of the Act urged upon this Court in the  
25 government's Petition for Writ of Certiorari is correct,  
26 that will be its certain effect.

27 Obviously, the statute was aimed at protecting interstate  
28 shippers from hijacking and "shakedowns." Most of the  
29 heated debates surrounding the 1946 amendment focused on  
30 whether the proposed bill was directly aimed at labor (the  
31 Teamster's Union for the most part), or whether it applied  
32 to "anyone" engaged in extorting payments from interstate

1 truckers who were not members of local unions.<sup>1/</sup> The insistence  
2 by various members of Congress that the bill was aimed at  
3 "all" persons was generally in response to the oft-voiced  
4 opposition that the bill was "anti-labor," and was supported  
5 by the proponents as a frontal attack on the labor movement.  
6 The legislative history is clear in one respect: the bill  
7 was intended to apply to the interstate shipping industry as  
8 it was then known, and certainly not in the same context as  
9 we presently consider interstate commerce by application of  
10 the de minimus contact rule.

11 While courts are unable to apply a different definition  
12 of "commerce" to Hobbs Act prosecutions, the Sixth and Ninth  
13 circuits have sought to limit an overbroad application of  
14 the Act by requiring a showing that some activity tantamount  
15 to "racketeering" is involved.<sup>2/</sup> Only by such judicially  
16 engrafted restrictions can the statute be applied without  
17 violence to the well established principle of federalism  
18 against usurpation of a state's criminal jurisdiction. The  
19 conduct complained of below is proscribed by state law.<sup>3/</sup>  
20 But for the lack of any element of taking from the person,  
21 it could have been an attempted bank robbery. Had the crime

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25 <sup>1/</sup> This Court discussed the legislative framework of the  
26 Hobbs Act in United States v. Enmons, 410 U.S. 396 (1973).

27 <sup>2/</sup> United States v. Yokley, 542 F.2d 300 (6th Cir.1974)

28  
29 <sup>3/</sup> Extortion is a violation of the California Penal Code,  
30 §518, 520.

1 been completed, without a taking from the person, it could  
2 have been a bank larceny.<sup>4/</sup>

3 A holding that any robbery or extortion of a victim  
4 engaged in "commerce" (as that term is now interpreted) would  
5 violate the Hobbs Act, would surely be "an extraordinary and  
6 unprecedented encroachment into the realm of state sovereignty."  
7 (Opinion, Appendix to Petition, p. 4a) Absent a clear  
8 Congressional declaration that a federal criminal statute  
9 is intended to result in such an incursion into the criminal  
10 jurisdiction of the states, any ambiguities must be resolved  
11 in favor of the accused.<sup>3/</sup>

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15 <sup>4/</sup>  
16 In United States v. Snell, 550 F.2d 515 (1977), the  
17 Ninth Circuit held the Hobbs Act inapplicable to an extortion  
18 plot which contemplated a taking from the presence of the  
19 bank employee. Since the planned conduct came within the  
20 definition of bank robbery, a conspiracy conviction was  
21 affirmed. See also United States v. Beck, 511 F.2d 997 (6th  
22 Cir.1975), where a conviction of bank larceny [18 U.S.C.  
23 §2113(b)] was affirmed. While in Beck there was no taking  
24 "from the presence" to constitute robbery, there was a  
25 "taking" sufficient to support the larceny conviction.  
26 Since the conduct clearly fell within the purview of §2113(b),  
27 the Hobbs Act conviction was reversed since the bank theft  
28 statute exclusively proscribed the conduct within its coverage.

29 United States v. Greiser, 502 F.2d 1295, cited by the  
30 petitioner (Petition, p. 9) as a decision affirming a Hobbs  
31 Act conviction "in circumstances almost identical to those  
32 present here," did not consider the question of whether the  
conduct fell within the ambit of 18 U.S.C. §1951. It can  
hardly be cited to support an issue not considered by the  
Court. Upon analysis, the Greiser decision is in conflict  
with the later decision of the Ninth Circuit in Snell,  
supra, (cited in Petition, p. 9) holding conduct almost  
identical to be pre-empted by the bank robbery statute, 18  
U.S.C. §2113(a), where the taking is from the physical  
presence of the bank employee.

33 <sup>5/</sup>  
34 This Court discussed the legislative framework of the  
35 Hobbs Act in United States v. Enmons, 410 U.S. 396 (1973).



1 On the general subject of interpretation of federal  
2 criminal statutes, this Court said:

3 Since there is no common law offense against  
4 the United States [citations omitted], the ad-  
5 ministration of criminal justice under our federal  
6 system has rested with the states, except as  
7 criminal offenses have been explicitly prescribed  
8 by Congress. We should be mindful of that tradition  
9 in determining the scope of federal statutes  
10 defining offenses which duplicate or build upon  
11 state law . . .

12 Jerome v. United States, 318 U.S. 101 at p. 104-  
13 105.

14 There are occasions when specific conduct, albeit  
15 reprehensible, does not fall within the ambit of a particular  
16 federal statute. See, for example, LeMasters v. United States,  
17 378 F.2d 262 (9th Cir.1967) holding that obtaining money  
18 from a bank under false pretenses is not a federal crime.  
19 The remedy is with Congress; not with a judicial interpretation  
20 which will work such an expansion of federal jurisdiction.


#### 21 CONCLUSION

22 Respondent concedes that the law is unclear on the  
23 scope of the Hobbs Act. Perhaps if the prosecutions were  
24 limited (as Congress obviously intended) to hijacking and  
25 racketeering having a direct affect on the right to freely  
26 transport goods in interstate commerce, rather than seeking  
27 to expand federal criminal jurisdiction to a holdup of a K-  
28 Mart Department Store by two robbers with a de minimus  
29 burden on interstate commerce (Yokley, supra), the issue  
30 would lend itself to easy resolution. While there may be  
31 need to "plug the loophole," so to speak, it should not be  
32 at the expense of such a broad encroachment on the sovereignty

1 of the states. The Petition for Writ of Certiorari should  
2 be denied.

3 DATED: August 24, 1977

4 Respectfully submitted,

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6 JAMES F. HEWITT  
7 Federal Public Defender  
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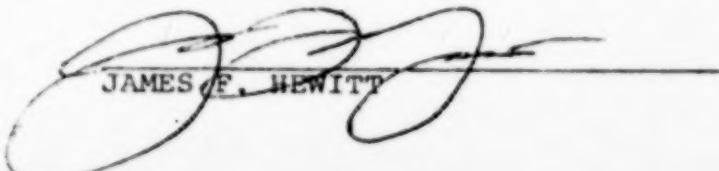
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16 CERTIFICATE OF SERVICE

17 STATES OF CALIFORNIA )  
18 ) ss.  
COUNTY OF SAN FRANCISCO )

19 James F. Hewitt, a member of the bar of this Court,  
20 certifies that pursuant to Rule 33 he served the within  
21 Motion for Leave to Proceed in Forma Pauperis and Memorandum  
22 in Opposition to Petition for Writ of Certiorari on the  
23 counsel for petitioner by enclosing a copy thereof in an  
24 envelope, postage prepaid addressed to:

25 The Honorable Wade H. McCree, Jr.  
26 Solicitor General of the United States  
Department of Justice  
Washington, D. C. 20530

27 and depositing same in the United States mails at San  
28 Francisco, California, on August 24, 1977, and further  
29 certifies that all parties required to be served have been  
30 served.  
31  
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JAMES F. HEWITT